Chapter 17

A Beginner's Guide to Criminal Law Practice in West Virginia Federal Courts

INTRODUCTION

My boss at the insurance defense firm which graciously employed me during law school one day asked me to file a document. *File!* I didn't learn *filing* at the College of Law.

And so I learned that "filing" meant: hand it to the court clerk (today it means: click the mouse). With the boss' document in hand, I drove my Geo *Metro* across town and arrived at the county court clerk's office shortly after four o'clock. It was closed.

This is a *Beginner's* guide to criminal law practice in federal courts in West Virginia. Read it together with *A Practical Guide to Defending Criminal Cases in West Virginia*, and your boss won't have to show you to the Local Rule on *filing*.

Best regards,

Steve

Steve Warner.

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I: Getting Started

1. Federal Court Organization

a. Districts

The country is divided into "districts" and "circuits". There are 94 districts in the United States. West Virginia has two districts: the Northern District of West Virginia and the Southern District of West Virginia. Each district has a court system called the district court. You can visit the two respective web sites, at www.wvnd.uscourts.gov and www.wvsd.uscourts.gov. District courts are the same as West Virginia's circuit courts, where we battle it out. They are "trial courts." The Federal Rules of Evidence (FRE) and Federal Rules of Criminal Procedure (Crim.P.) are very similar to the West Virginia rules. If you've tried a case in Ohio County Circuit Court, then you can try a case in the United States District Court in Beckley.

United States District Judges have lifetime appointments, compliments of a presidential appointment and confirmation by the senate. They can move about the district, and so it is not uncommon to see a district judge from Wheeling preside over a jury trial in Elkins, since both locations are in the Northern District. District judges hire magistrate judges to handle some of their case load, such as arraignments, detention hearings and change of plea hearings. *See* Crim.P. 59 (Matters Before the Magistrate Judge), the Northern District's LR Cr P 10.01 (Duties of the Magistrate Judge) and the Southern District's LR Cr P 59.1 (General Authority of Magistrate Judges). Magistrate judges serve eight year terms. *See* 28 USC 631. Unlike West Virginia state courts, magistrate judges and district judges do not work in separate court systems. There is no federal magistrate court.

Each district has one United States Attorney, appointed by the president and confirmed by the senate, to represent the United States in civil and in criminal matters. United States Attorneys have four year appointments, and so they tend to come and go as presidents do. *See* 28 USC 541. They, in turn, hire Assistant United States Attorneys (hereafter, federal prosecutors) to handle the district caseload. AUSAs tend to stick around as United States Attorneys come and go. United States Attorneys answer to the United States Attorney General. Attorney General guidance to federal prosecutors is in the United States Attorneys Manual (USAM), where you can find the *Principles of Federal Prosecution* at USAM 9-27. Attorney General guidelines and policies do not create enforceable rights for criminal defendants. *United States v. Cooks*, 589 F.3d 173, 184 (5th Cir. 2009).

The U.S. Attorney's Office can prosecute any violation of federal criminal law, whether it was investigated by a town police officer or by a federal agent. Generally, a federal crime is one that occurred on federal property (i.e., the Monongahela National Forest) or involved interstate

commerce. In 21 USC 801, Congress found that "a major portion of the traffic in controlled substances flows through interstate and foreign commerce," and so a federal prosecutor can prosecute a distribution of marijuana even if the marijuana was home-grown, without having to prove interstate commerce. Federal prosecutors can prosecute a gun crime (i.e., felon in possession) if the gun traveled in interstate commerce at any time in the gun's life. *United States v. Gallimore*, 247 F.3d 134 (4th Cir. 2001). Since there are no gun factories in West Virginia, firearms used in federal crimes in West Virginia are likely to have traveled in interstate commerce, and the federal prosecutor can prove this with expert testimony from an ATF agent. Economic offenses such as embezzlement are often prosecuted in federal court if the embezzlement scheme involved the United States Mail (mail fraud – 18 USC 1341) or the internet (wire fraud – 18 USC 1343).

Districts are divided into "divisions" for convenience. There is typically one courthouse per division. The Northern District's Elkins Division, for example, is made up of 10 counties and one courthouse. Because division lines are drawn for convenience within a district, you can't claim improper venue if your federal case arising in Greenbrier County is tried in the United States District Court in Huntington. Both locations are within the Southern District.

b. Circuits

The 94 districts are divided into 12 circuits. Each circuit has a United States Circuit Court of Appeals, which hears appeals from convictions and sentences imposed in the district courts in the circuit. We're in the *Fourth Circuit*, at www.ca4.uscourts.gov. The Fourth Circuit is made up of all districts in West Virginia, Maryland, Virginia, North Carolina and South Carolina. The courthouse is in Richmond, Virginia. To appear in the United States Circuit Court of Appeals for the Fourth Circuit, you must be admitted to practice in the Fourth Circuit. Yes, that's in addition to your license to practice in the district from where your appeal comes.

The Fourth Circuit has an online filing system called the "Case Management/Electronic Case Filing System", or CM/ECF, so you don't need to drive your Geo *Metro* to Richmond to file a brief. The folks at the Fourth Circuit are very friendly and helpful. Contact information is available at their web site (above), where you can also find forms and instructions. Once your case is docketed, a friendly case manager will be assigned to your case. Don't be afraid to call for guidance.

United States Circuit Courts of Appeals issue *published* opinions and *unpublished* opinions. Somewhere near the top of the opinion, it'll say whether it's published. Published opinions of the Fourth Circuit Court of Appeals are binding on the district courts within the Fourth Circuit. That means a district judge in Clarksburg *must* follow Fourth Circuit published opinions. If you're citing a case in a motion or a brief, you want it to be a Fourth Circuit published opinion. That is a very good reason to have a copy of the *Fourth Circuit Criminal Handbook*, by Carl Horn, III.

Unpublished opinions are persuasive authority. *See* the Fourth Circuit's Local Rule 36(c). There was a time when citing an unpublished opinion was prohibited, but the Supreme Court made

a change to the Federal Rules of Appellate Procedure in 2006. Now, FRAP 32.1 permits the citation of an unpublished opinion issued on or after January 1, 2007. Like unpublished opinions, opinions of other U.S. Circuits are persuasive authority. If there is no Fourth Circuit published opinion on point, you should say so in your brief and then turn to unpublished opinions (post-2007) and/or published opinions from other circuits.

Traveling to the Fourth Circuit is a wonderful experience. Take your camera. Drive through the Allegheny Mountains on U.S. 250, cross the Shenandoah Valley and the Blue Ridge Parkway. Visit historic civil war sites along the way and stop at Monticello. Spend the night in Richmond because you'll be arguing in the morning. Enter the courthouse from its backside on Bank Street. That's directly across the street from the beautiful Virginia State Capitol and near the birthplace museum of Edgar Allen Poe. Inside, your case manager will tell you the names of the three Circuit Judges before whom you'll be arguing, and you'll be directed a courtroom down the hall.

2. Prerequisites

a. Get Licensed in the District

You cannot practice law in the district court without first being admitted to practice law in the particular district. A license to practice in one district is not a license to practice in another district. Each district has Local Rules for admission to practice, and so you'll have to contact the clerk's office and/or visit the District Court's web site to read the local rule and obtain forms. The rules are easy to find at all three sites (Northern District, Southern District and Fourth Circuit). Click "attorney information" and/or "attorney admission."

The Southern District's LR Cr P Rule 44.1 reads, "Any person who is admitted to practice before the Supreme Court of Appeals of West Virginia and who is in good standing as a member of its bar is eligible for admission as a member of the bar of this court." The Northern District's LR Gen P 83.01 reads, "Any person admitted to practice before the Supreme Court of Appeals of West Virginia and in good standing as a member of its bar is eligible for admission as a permanent member of the bar of this Court." So, you need to be a member of the West Virginia State Bar, and you must comply with the West Virginia Rules of Professional Conduct and the West Virginia Standards of Professional Conduct (located at the state bar web site).

b. Sign-up with CM/ECF

The district clerk in every district manages an online "Case Management/Electronic Case Filing System", or CM/ECF. You need to sign-up with CM/ECF in the particular district of your case by calling the district clerk's office. You'll need an email address, a credit card and the ability to convert documents to pdf format. The district clerk's site also contains useful contact information, guidance and resources, such as the local rules. Ask the clerk about free CM/ECF training.

Everything is online. You will file motions in PDF format at the district clerk's CM/ECF site. You will receive orders and notices of hearings in your inbox. The federal prosecutor may email discovery to you (which, by the way, won't be *filed*). You can (and should!) view the entire docket for your case (except for sealed documents) by logging onto the district clerk's CM/ECF site. You won't get a paper notice. It is not uncommon to receive a CM/ECF emailed notice of an initial appearance merely hours before the hearing. Either you saw the email or you missed the hearing.

You can choose to receive filings one of two ways: (1) one single daily email containing all filings in your cases that day, or (2) emails throughout the day as filings occur. Choose the latter or you'll miss your client's initial appearance!

c. Become a CJA Panel Attorney

Contact the district clerk to learn how to become a CJA Panel Attorney (that's Criminal Justice Act, at 18 USC 3006A). You can also call the Federal Public Defender for the Southern District (Charleston) or the Federal Public Defender for the Northern District (Clarksburg) for guidance. Each public defender office maintains a web site, at www.wvn.fd.org and www.wvs.fd.org, filled with important guidance, resources and training opportunities for you.

Once you become a CJA panel attorney, you'll be placed on the list of attorneys in the district from which a magistrate judge will order appointments to represent indigent criminal defendants. The magistrate judge, or the public defender, may call or email you first to confirm your availability. Once appointed, it's an *order* enforceable by contempt. Without a subsequent order relieving you as counsel, there is no way out!

d. Reference Materials You'll Need

1. Title 18, United States Code, Part I (Crimes)
2. Title 18, United States Code, Part II (Criminal Procedure)
3. Title 21, United States Code, Section 841 (drugs)
4. Federal Rules of Criminal Procedure
5. Federal Rules of Evidence
6. U.S. Sentencing Guidelines Manual

At the arraignment and at the change of plea hearing, the magistrate judge will ask your client whether you have discussed the United States Sentencing Guidelines with her. *See* Crim. P. 11(b)(1)(M). The magistrate judge may hold up a copy of the table on the inside back cover of the guidelines manual during the hearing and ask your client if she recognizes it. Her answer needs to be "yes."

7. Fourth Circuit Criminal Handbook

The *Fourth Circuit Criminal Handbook*, by Carl Horn, III, is a very excellent research tool for locating Fourth Circuit opinions to cite in your memo or brief, or to generally research the law on a subject in the Fourth Circuit.

8. Local Rules of General Practice for the Northern District
9. Local Rules of Criminal Procedure for the Southern District
10. Local Rules of Criminal Procedure for the Southern District

Each district has *Local Rules*. They are located at each district court's web site. The Northern District's Local Rules of General Practice and Procedure (LR Gen P), contains rules on filing, scheduling conflicts, and contact with jurors. Both districts have Local Rules of Criminal Procedure (LR Cr P) which supplement the Federal Rules of Criminal Procedure.

11. Federal Rules of Appellate Procedure
12. Local Rules for the Fourth Circuit Court of Appeals

At the home page of the Fourth Circuit (www.ca4.uscourts.gov) you will find the "Federal Rules of Appellate Procedure, Local Rules of the Fourth Circuit, and Internal Procedures," which is very handy because therein these three sets of rules are combined into one mixed document. So for example, Local Rule 18 immediately follows Federal Rule 18. Even better, it's free.

13. West Virginia Rules of Professional Conduct
14. West Virginia Standards of Professional Conduct
15. ABA Model Rules of Professional Conduct

The State Bar's web site contains a link to the West Virginia Rules and Standards – or at least the web site for the Office of Disciplinary Counsel (www.wvodc.org) has the link. The ABA Model Rules can be found at www.americanbar.org. When is the last time you read any part of any of these important documents?

3. The Difference Between State and Federal Court

The Rules of Criminal Procedure are generally the same in federal court as they are in state court. Same with the Rules of Evidence. Crimes in Title 18 of the United States Code have different definitions than crimes in Chapter 61 of the West Virginia Code, but trying a case in federal court is the same as trying a case in state court. Make a bulleted list of the elements of the charged crime. Under each bullet, list the statements of witnesses and the items of evidence that tend to prove or disprove the element. Link each item of evidence to a witness. Then present your witnesses to the jury, one by one, eliciting the listed statements and linked evidence from each witness as you progress. Read up on your trial advocacy book for tips on style and persuasion, and throw in an opening statement and closing argument. It's as easy as *filing*.

So why is federal court so different? Because (1) the trial date will come quickly (there's no waiting around for the 2 term rule), (2) your client won't need a bail bondsman (she'll either be out or in), (3) the probation officer plays an awesome role (from day 1 through post imprisonment supervised release), and (4) the sentencing guidelines are scary (not really, they're easy!).

a. Speedy Trial

Federal court moves fast. In state court, most felony cases begin with a criminal complaint, possibly filed the day of the crime. Months will then pass while the prosecutor and police finish the investigation and then *present* it to a grand jury (requesting that the grand jury "return a true bill", also called an "indictment"). In federal court an indictment must be returned within 30 days of an arrest or service of a summons on a criminal complaint. Yes, that's *thirty* days. *See* 18 USC 3161(b). Federal grand juries don't conveniently meet on the 30th day, so a federal prosecutor might present the case to a grand jury in, say, two weeks. A federal trial must be held within 70 days of the indictment (18 USC 3161(c)(1)), but I've seen trial scheduled in a little as five weeks. But for sentencing, a federal case can all be over in two months.

b. Release Pending Trial

Factors a magistrate judge uses to determine whether to release a defendant on bond are in Part II of Title 18 of the United States Code, at 18 USC 3142(g). I've heard them called the "g factors." These factors are generally the same as the state court bail factors in *State ex rel. Ghiz v. Johnson*, 155 W.Va. 186 (1971), commonly called the "*Ghiz* factors." The difference between federal and state court is the cost of freedom while a defendant is presumed innocent (i.e., before a conviction). State courts typically order that a number of dollars must be posted as a condition of pretrial release. The dollar amount helps assure the defendant won't flee to another country if her mother posted the deed to her house.

Federal courts almost never require money as a condition of bail. Either a defendant is detained (without bond) or a defendant is released on terms which do not include the posting of money. I cannot recall a bondsman ever being used in federal court. This makes some people uneasy – that a criminal is out on bond! – but the reality is that federal probation officers do a very good job of supervising pretrial defendants while they are presumed innocent.

c. Sentencing

There are no indeterminate ("1 to 10") sentences in federal court. Every sentence is a fixed number of months of imprisonment, or a fixed number of years of probation, and within the range established by the statute of conviction. The fixed number of months of imprisonment will be based on two things: (1) the factors in Title 18, United States Code, Section 3553(a), which are the same factors people have used since the beginning of time – deterrence, rehabilitation, respect for the law; and (2) the United States Sentencing Guidelines, which have been around since 1987. Prepare your client for a *guideline* sentence but ask the district judge for a downward departure from the guideline range under the §3553(a) factors.

The concept of "relevant conduct" in the United States Sentencing Guidelines separates federal sentencing from state sentencing. Relevant conduct is defined and described in chapter 1 of the guidelines. If a defendant is convicted of any offense, her guideline sentence will be calculated based on all of her "relevant conduct," whether charged or not. What conduct is "relevant" will be *found* by the district judge at sentencing using a preponderance of the evidence standard.

There is no parole in federal court and the defendant will never see a parole board. The Bureau of Prisons can award a "good time" sentence reduction of up to 54 days a year for any sentence "of more than 1 year." *See* 18 USC 3624. In state court, an inmate is released early to be placed on parole. In federal court an inmate is not released early and after serving the sentence she is placed on supervised release, typically for 3 years.

4. The Purpose of Your Appointment

If you've been appointed to represent a person in a criminal proceeding in federal court, then your client has received a subpoena, a target letter or a charging document (indictment or criminal complaint). The purpose of your appointment is legal advice and help with the problem presented by that document.

a. Subpoena

If your appointment is to represent a person subpoenaed to testify as a witness (either before a trial jury or a grand jury), your job is to advise her about her rights at that appearance. You cannot be inside the grand jury room due to secrecy rules (see Crim. P. 6(d) and (e)), but you can be nearby. During questioning while on the witness stand, your client can ask for recess to privately consult with you before answering a question. She cannot avoid the subpoena and, while on the witness stand and under oath, she must tell the truth.

Your client may be able to avoid giving an answer to a specific question by asserting a privilege. Question: "Did you see the defendant hand crack cocaine to the informant?" Answer: "I assert the Fifth Amendment privilege."

The two most likely privileges are (1) the marital (also called the "spousal") privilege and (2) the Fifth Amendment privilege against self-incrimination. If the Fifth Amendment privilege is an issue, you may want to meet with the federal prosecutor before the hearing and ask for a "use-immunity" agreement. Read-up on the marital privilege, the Fifth Amendment privilege against self-incrimination and use-immunity.

b. Target Letter

Sometimes instead of filing a criminal complaint or asking a grand jury to "return" an indictment, a federal prosecutor may choose to send a investigated person a "target letter." A target letter advises a person that she is a "target" of a federal investigation, that she should retain counsel or apply for court-appointed counsel (by filling-out an attached financial affidavit) and that she and

her lawyer should contact the federal prosecutor to schedule a meeting. The letter may be hand delivered to the person by the lead investigator (also called the "case agent").

A target letter is an opportunity for a targeted person to negotiate a resolution before any charges have been filed, typically by agreeing to plead guilty to something. If your client is innocent, a target letter meeting might give your client an opportunity to convince the federal prosecutor to leave her alone.

Before meeting with the federal prosecutor, you should ask the federal prosecutor for her intentions. If your client joins you at the meeting, ask the federal prosecutor before the meeting whether any statements the client makes at the hearing will be protected pursuant to Rule 11(f) or pursuant to a grant of use-immunity. Conduct informal discovery and collect formal discovery from the prosecutor, and ultimately, even though a target letter scenario is less formal than an indictment scenario, you should have the same level of confidence in your advice to your client as you would if your client was prosecuted by indictment.

One possible benefit of a target letter is the reduction of anxiety and public hearings. Another benefit to the defendant may be ability to freeze her Guideline relevant conduct by entering into a plea agreement stipulation, while federal authorities continue to collect evidence against other targets of the investigation. In all federal plea agreements, you should expect a provision requiring your client to answer relevant questions and to testify against co-defendants. Beyond this and often in the context of a target letter, your client may be asked if she would like to assist the criminal investigation by engaging in affirmative steps, such as wearing a body wire, to collect evidence. This is dangerous business and your client does not have to agree to do this assistance. There cannot be adverse repercussions for her choice to not become a "confidential informant," and a plea offer won't include a requirement that she assist.

In rare cases where assistance produces actual results, "substantial assistance" can earn your client a sentencing guideline reduction pursuant to U.S.S.G. 5K1.1, or a sentence below a statutory mandatory minimum pursuant to Title 18, United States Code, 3553(e). A motion for a 5K1.1 guideline reduction or 3553(e) relief from a mandatory minimum can only be made by the United States Attorney and it is at her discretion, after she assesses your clients assistance.

If target letter discussions result in a plea agreement, your client will plead guilty to a charging document called an *information*. Yes, *information* is a noun. It has the same effect as an indictment, except that it was not "returned" by a grand jury and it was not reviewed by a Magistrate Judge. Instead, the federal prosecutor merely files an information with the district clerk. The district clerk will schedule a Rule 11 arraignment on the information. Unlike an arraignment in any other context, your client will plead guilty (pursuant to the plea agreement) instead of not guilty.

c. Criminal Complaint

In both state and federal courts, a defendant cannot be convicted of a felony on a criminal

complaint. The criminal complaint is merely a document used to lodge charges against a person while a prosecutor's office prepares the case for a grand jury presentment.

In state court, a criminal defendant can remain in jail charged by criminal complaint for up to two terms of court (i.e., eight months) without ever being indicted. *See Ex parte Blankenship*, 93 W.Va. 408, 116 S.E. 751 (1923) and W.Va. Code 62-2-12. In federal court, a criminal complaint is only good for thirty days from the date of arrest. *See* 18 USC 3161(b). If an indictment is not returned within thirty days, the complaint is dismissed and the defendant is released from custody. As a practical matter, federal grand juries don't conveniently meet on the thirtieth day, and so the federal prosecutor will have to present the case to a federal grand jury in, say, two weeks. It is hard to imagine a criminal complaint being issued in federal court unless there is a need for emergent action. Most federal cases begin with a direct indictment.

d. Indictment

More likely, your case will begin with an indictment. If your client has been indicted, your case will begin with the initial appearance (on indictment), in the list below.

II: Thirteen Hearings

If a federal criminal case begins by criminal complaint, the case can see up to thirteen hearings. If the case begins by direct indictment, the first hearing will be number 6 (initial appearance on indictment), below. An appeal or a subsequent collateral attack (habeas corpus petition) may trigger additional hearings. The thirteen hearings, in chronological order, are:

1. presentation of criminal complaint
2. initial appearance on the criminal complaint
3. preliminary hearing
4. detention hearing on the criminal complaint
5. presentation of an indictment to a grand jury
6. initial appearance on the indictment
7. arraignment
8. detention hearing on the indictment
9. motions hearing
10. pretrial conference
11. guilty plea hearing
12. trial
13. sentencing hearing

1. Presentation of Criminal Complaint

Neither you nor the defendant will be aware of this hearing. It occurs secretly in a United States magistrate judge's chambers, where a federal prosecutor will present a criminal complaint to

the magistrate judge. The complaint has two parts: (1) the charge (or charges); and (2) an affidavit in support of the charge (or charges). The charging language in a criminal complaint must have the same probable cause and particularity as an indictment or an information, which is also the same probable cause in a state court complaint, indictment or information.

After the magistrate judge studies the complaint and determines the affidavit established probable cause that (1) the crime charged in the complaint was committed, and (2) that it was committed by the named defendant, then the magistrate judge will place the officer (case agent) under oath and ask her to swear to the affidavit. The magistrate judge then signs the complaint and takes it across the hallway to the district clerk's office where it is filed under seal, along with an arrest warrant.

2. Initial Appearance (on Criminal Complaint)

The initial appearance is held pursuant to Crim.P. 5 "without unnecessary delay." It often occurs within hours of a defendant's arrest, by video link between a regional jail and the magistrate judge's courtroom. Crim.P. 5(d) lists five things (A-E) the magistrate judge must inform a defendant at the initial appearance, including the right to counsel. You can read the list yourself.

3. Preliminary Hearing

Crim.P. 5.1 is titled "Preliminary Hearing." A federal court preliminary hearing is the same as a state court preliminary hearing. A preliminary hearing only occurs while a defendant is charged by criminal complaint and there is no preliminary hearing after an indictment has been returned or an information filed. At the preliminary hearing, the burden of proof (elements of the crime) and the burden of persuasion (probable cause) is on the federal prosecutor to prove there is the same probable cause as is already in the criminal complaint affidavit, except that the preliminary hearing gives a defendant's lawyer an opportunity to test the evidence by cross examining prosecution witnesses and, after the federal prosecutor rests, by presenting witnesses to negate probable cause. *A Practical Guide to Defendant Criminal Cases in West Virginia*, first published in the fourth edition of the West Virginia Practice Handbook, contains a chapter on preliminary hearings written by a seasoned state public defender, with advice on things such as defense strategy at the preliminary hearing.

Preliminary hearings are not as common in federal court as they are in state court, because (1) criminal complaints are less common in federal court, because (2) a federal criminal complaint is only valid for a period of thirty days from the date of arrest (18 USC 3161(b)). Hence, an indictment typically quickly supersedes the few complaints seen in federal court and the preliminary hearing is bypassed.

4. Detention Hearing

The detention hearing will likely immediately follow the preliminary hearing. It will be conducted the same as a detention hearing following an indictment, so please read that section

below.

5. Presentation of an Indictment to a Grand Jury

Grand jury proceedings are secret. Crim.P. 6(d) lists the persons who are allowed in the grand jury room. The list does not include you. Nor does it include a judge. The only persons permitted in the grand jury room while a witness is testifying are (1) the presenting federal prosecutor, (2) a court reporter, and (3) the witness. A district judge plays a role in convening a grand jury and receiving returned indictments, but a judge is not permitted in the grand jury room while evidence is being presented.

The burden of proof and the burden of persuasion before a grand jury is, again, probable cause. Sixteen grand jurors make a quorum. Crim.P. 6(a)(1). Twelve votes in favor of a "true bill" are required for an indictment to be "returned" to the district judge. Crim.P. 6(f).

If your case began with an indictment, it is called a "direct" indictment because it did not stem from a criminal complaint.

6. Initial Appearance

When an indictment is returned, the district judge will either issue an arrest warrant or a summons. If the defendant is arrested, she will receive an initial appearance "without unreasonable delay" pursuant to the Crim.P. 5(d), as she would for an initial appearance upon a criminal complaint. The defendant won't be advised of a right to a preliminary hearing, though, because she doesn't have this right after an indictment has been returned.

The initial appearance may be held by video link between the regional jail (where the U.S. Marshal's Service has a contract to house federal detainees), or it may occur in the courthouse. Often neither the federal prosecutor nor a defense lawyer is present. One of the significant purposes of an initial appearance is to advise a defendant of her right to counsel, and for her to submit a financial affidavit for the appointment of counsel if she cannot afford her own lawyer. That's how you got appointed.

7. Arraignment

Crim.P. 10(a) says that the arraignment "must consist of" three things. First, the magistrate judge must ensure "that the defendant has a copy of the indictment. Second, the indictment must be read to the defendant (unless the reading is waived). Third, the defendant will be asked to plead.

Conduct the initial client interview before the arraignment. Take a spare copy of the indictment to the initial client interview and give it to your client, so she won't answer "no" when the magistrate judge asks if she has been given a copy. Read it to her and suggest that she waive the indictment reading. Nobody at the arraignment really wants to sit through a word for word reading of a federal indictment.

8. Detention Hearing

The detention hearing is held pursuant to 18 USC 3142(f). Section 3142(f)(2) says that the detention hearing "shall be held immediately upon the person's first appearance, unless that person, or the attorney for the government, seeks a continuance." 18 USC 3142(f)(2). The federal prosecutor can continue the detention hearing for up to 3 days. The defendant can continue the hearing for up to 5 days. *See* 3142(f)(2). If your client is charged with one of the crimes listed in 18 USC 3142(e)(3) (A-E), then this section creates a "rebuttable presumption" that your client is dangerous and a flight risk. If so, you will have the burden of proof (that she is not a danger and a flight risk) and the burden of persuasion (by clear and convincing evidence) at the detention hearing. Facts on the issue of danger and flight are contained in 18 USC 3142(g), sometimes called the "g" factors. They are similar to the state court Ghiz factors.

Come to the detention hearing with a release plan. If released, where will your client live? Who will she live with? Will a family member testify at the detention hearing that she (the family member) will sign a third-party custodian agreement, promising to report any violation of pretrial release terms? You won't have much time to file a written motion for pretrial release (i.e., objection to the government's motion for detention), but if you can, file a motion for release explaining the release plan and explaining why your client is not a danger and a flight risk. Attach letters to the motion from employers, teachers, family members and citizens who have good character information, and bring those people with you to the detention hearing so they can testify about the "g" factors (1-4) in 18 USC 3142(g).

While you are preparing for the detention hearing, so will the probation officer. The probation officer may interview family members, employers and neighbors, research your client's criminal history, and talk to the police. Based on this investigation, the probation officer will prepare a report to aid the magistrate judge in deciding whether to release your client on terms and conditions described in 18 USC 3142. It is very rare for a defendant to be required to post a dollar amount to secure her release. Instead, nearly all defendants are either released on a personal recognizance bond or detained without bond. Work with the probation officer to find a suitable release plan for your client. It is even better if you can get the federal prosecutor on board before the hearing.

18 USC 3145 is titled "review and appeal of a release or detention order." You might need it. As well, section 3142(h) permits you to file a motion to reopen the detention hearing at any time before trial if new information has "material bearing" on the "g" factors.

9. Motions Hearing

At the arraignment, the magistrate judge will announce a deadline for you to file any motions. The magistrate judge will schedule a date and time for a hearing on any motions you might file. Motions you might typically file are the same as motions in state court, and you should be cautious of Rule 3.1 of the Model Rules of Professional Conduct (Meritorious Claims And

Contentions) before filing a motion in federal court **(**notwithstanding anything you might read about state court practice in *A Practical Guide to Defending Criminal Cases in West Virginia*). Your motion will be expected to have a "basis in law and fact that is not frivolous."

Crim.P. 47 is titled "Motions and Supporting Affidavits," but the Northern District also has LR Cr P 47.01 (Motions) and the Southern District has LR Cr P 12.1 (Pretrial Motions). These rules speak of a written motion, supporting affidavit, memorandum and brief. Confused? The real answer is to ask the judge what she expects. Generally and in the absence of any direction from your specific judge, if your motion is very short, you can do it in one single document. If it is more than two pages, I recommend you file two documents: (1) a very short motion which very succinctly states the grounds; and (2) a memorandum, outlined similarly as an appellate brief or habeas brief, with section headings for the issues, a statement of facts, the standard of review, a statement of the law, argument(s) and a conclusion.

Generally, there are four types of motions in any criminal case. They are:

a. Motions to Dismiss:

i. Defects in the charging process

Motions to dismiss the indictment due to defects in the charging process are rare, and will most often be based on transcripts of the proceedings before the grand jury. Even though grand jury proceedings are protected by secrecy rules, testimony of a witness before the grand jury is a discoverable 26.2 statement. See Crim.P., Rule 26.2.

ii. Defects in the charging document

When you first receive the indictment, study it carefully. Look-up the code section and confirm that all the essential elements of the crime are in each count of the indictment. If the charging document is a criminal complaint, does the affidavit really establish probable cause?

iii. Delays chargeable against the United States

18 USC 3282 is the federal statute of limitations. Unless a specific statute provides to the contrary, there is a five (5) year statute of limitations in federal court. Whew! Under 18 USC 3161, a complaint is valid for only thirty (30) days from the date of arrest. In other words, an indictment must be returned within 30 days of an arrest on a criminal complaint, or the defendant will be released and the complaint dismissed. Once indicted, 18 USC 3161 requires the trial to be held within seventy (70) days of the initial appearance (on the indictment).

b. Motions to Suppress

A motion to suppress seeks to exclude evidence at trial which was obtained in violation of the constitution. This is called the exclusionary rule. The motion seeks to exclude (suppress)

evidence from the trial. You can only move to suppress evidence that the federal prosecutor intends to use at trial, and you can't really know this until you receive discovery from the federal prosecutor. After all, if the United States is aware of a confession which it doesn't intend to use it at trial, then there's not much point in filing a motion to suppress. Of course, that would be a rare scenario.

A motion to suppress typically targets three types of evidence:

i. Confessions;
ii. Searches w/ seizures; and
iii. Line-ups and other identification procedures.

c. Motions *in Limine*

The difference between a motion to suppress and a motion *in limine* is that a suppression motion targets *constitutional* violations while an *in-limine* motion seeks to exclude evidence from the trial on non-constitutional grounds. Most commonly, a motion *in limine* seeks to exclude evidence which is irrelevant (Rule 402) or evidence which is unfairly prejudicial (Rule 403), such as collateral crimes evidence. These rules are the same in state court as they are in federal court.

10. Pretrial Conference

A pretrial conference will be held approximately one week before trial. This may be the first time your client will see the district judge before whom the jury trial will be held. The previous hearings can all be handled by a magistrate judge.

Crim.P. 17.1 is titled "Pretrial Conference." Rule 17.1 discusses "matters agreed to during the conference," but you should not wait for the conference to agree to matters. By this time, you should be ready for trial. Your witness list and exhibit list should be filed. Your witnesses should be under subpoena. You should have submitted voir dire questions and jury instructions to the district court pursuant to the Local Rules. The purpose of the pretrial conference is for the district judge to assess the logistics of the trial. Are there any issues that need resolved before trial? How long with the trial take? Some district judges have a checklist they use at the pretrial conference, and if you call the district judge's chambers, most judges will give you a copy of the checklist to help you prepare for the pretrial conference.

11. Guilty Plea Hearing

A hearing held for a defendant to plead guilty is commonly called a "change of plea" hearing because a "not guilty" plea is typically entered at the arraignment. If your client is pleading guilty pursuant to an information, she obviously won't be "changing" her plea. Either way, the hearing is very similar to a state court guilty plea hearing pursuant to *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975). The hearing in federal court is held pursuant to Crim.P. 11. Here's the order of business:

First, unlike an arraignment, a magistrate judge can only take a defendant's guilty plea if the defendant waives her right to have the hearing held before a district judge. The defendant will be asked whether she waives this right and if so, she will be asked to sign a written waiver. You should ask the clerk for a copy of the waiver before the hearing so she will be familiar with the document.

Second, if the defendant is pleading guilty pursuant to an information (see the above section on target letters), the defendant will need to waive her right to prosecution by way of indictment pursuant to Crim.P. 7(b). She will be asked to sign a form accomplishing this task so you should review the form with your client before the hearing.

Third, the federal prosecutor will be asked to summarize the plea agreement. The defendant will be asked if the written plea agreement contains every agreement between the parties, or whether there are any side deals. The answer needs to be "no." The magistrate judge will also ask you, the lawyer, if the plea agreement is the only plea offer made by the federal prosecutor or whether other offers were made, pursuant to the new case of *Lafler v. Cooper*, 2012 WL 932019 (March 21, 2012) and *Missouri v. Frye*, 2012 WL 932020 (March 21, 2012). If you'd like to avoid a habeas finding that you were ineffective during plea negotiations, read these two cases.

Fourth, the magistrate judge will review A-N of Crim.P. 11(b)(1) with your client. The magistrate judge will ask your client whether she wants to waive her various rights in A-N. Are you *sure* you want to waive your right to jury? Do you *really* want to plead guilty? It may sound as if the magistrate judge doesn't want your client to plead guilty. Do you *really* want to do this? Is anybody *forcing* you to plead guilty? Prepare your client for this conversation. If pleading guilty is what your client chooses to do, then tell the defendant to go into the hearing chin-up. If the defendant has doubts, go to trial.

Crim.P. 11(b)(1)(M) requires a discussion about the table on the inside back cover of the U.S. Sentencing Guidelines Manual. The magistrate judge will ask your client if she has seen the table before. Her answer needs to be "yes". The magistrate judge won't ask where she believes she will land on that table, but instead the question will be whether she and you have discussed the table.

Fifth, the federal prosecutor will be asked to present a witness to testify that a factual basis exists for each of the elements of the crime to which your client is pleading guilty. Typically, the testimony from the case agent will last ten minutes. Following direct examination, the magistrate judge will ask your client if she disagrees with any of the testimony. Certainly, if your client disagrees with any part of the factual basis she *must* speak up, because (1) she cannot answer the question falsely, and (2) those are the facts upon which she will be sentenced and they will be in the record for all eternity (and for the appeal). But this isn't the best time to announce there is a factual problem. You should engage in plea negotiations with the federal prosecutor which, in the end, leave you both confident of the facts not in dispute. The magistrate judge may ask your client to say what it is she did that makes her think she is guilty. Know the answer before the hearing begins.

Sixth is the matter of release or detention. 18 USC 3143 is titled "Release or detention of a defendant pending sentence or appeal." This statute contains a presumption of detention, and 3143(a)(2) contains very strong language in support of detention in a case described in 18 USC 3142(f)(1) (A-C). Still, if the federal prosecutor does not object to detention even in a 3143(a)(2) case, some district judges may release the defendant on the same terms she was under before the change of plea hearing. Your client will be a model pretrial release supervisee, right?

12. Trial

Trying a case in federal court is the same as trying a case in state court. Make a bulleted list of the elements of the charged crime. Under each bullet, list the statements of witnesses and the items of evidence that tend to prove or disprove the element. Link each item of evidence to a witness. Then present your witnesses to the jury, one by one, eliciting the listed statements and linked evidence from each witness as you progress. Read up on your law school trial advocacy book for tips on style and persuasion, and throw in an opening statement and closing argument. *A Practical Guide to Defendant Criminal Cases in West Virginia*, first published in the fourth edition of the West Virginia Practice Handbook, contains a chapter on conducting a jury trial.

13. Sentencing Hearing

Part II of Title 18 of the United States Code is titled "Criminal Procedure." Stop and look at the table of contents of Part II. You will see Chapter 227, which is titled "Sentences." This Chapter (Chapter 227, or 18 USC 3551 et seq.) requires a district judge to consider two things: (1) the United States Sentencing Guidelines, and (2) the factors listed in Title 18, United States Code, Section 3553(a).

a. 3553(a) Factors

The 3553(a) factors (18 USC 3553(a)) are general factors used by sentencing courts everywhere since William the Conquer brought law and order to England, such as deterrence, protection of the public and rehabilitation. By spending less time on the 3553(a) factors in this *Beginner's Guide*, I don't mean to reduce their importance. 18 USC 3553(a) says that the district

court "shall" consider the 3553(a) factors. In your sentencing memorandum you filed two weeks before the hearing and in your oral argument at the hearing, you want to use buzz words from 3553(a) to argue for a sentence below the range established by the Guidelines.

b. The Guidelines

In the beginning (that's 1987), the United States Sentencing Guidelines were mandatory. A district court was statutorily required to impose a sentence of a specific number of months within the narrow range in the cell of collision between the total offense level and a defendant's criminal history category. Look at the inside back cover of the guidelines manual. In 2005, the U.S. Supreme Court struck-down the mandatory nature of the guidelines in *United States v. Booker*, 125 S.Ct. 738 (2005). Today and as a result of *Booker*, a district court must (1) calculate the guideline range, but (2) sentence a defendant anywhere within the statutory range (whether within, below or above the guideline cell of collision).

The U.S. Sentencing Guidelines are easy. Start at Appendix A, and find the statute of conviction. Appendix A will refer that statute to a particular section in Chapter 2. Financial crimes are in section 2B. Drug crimes are in section 2D. Gun crimes are in section 2K. Complete that chapter 2 section, determining part (a)'s "base offense level," and part (b)'s "specific offense characteristics." Then work through all five parts of chapter 3, where you may "adjust" the Chapter 2 Guideline level based on acceptance of responsibility, role in the offense, and obstruction of justice. Then calculate your clients' criminal history "category" in Chapter 4. Now you are ready for Chapter 5's famous table, at U.S.S.G. §5A and also on the back cover, where the total offense level and the criminal history collide.

But first, read chapter 1's "relevant conduct." Here's where federal court sentencing is significantly different. If a defendant is convicted of any offense, her guidelines will be calculated based on all of her "relevant conduct." What conduct is "relevant" will be determined by the district judge by a preponderance of the evidence, and that evidence can be based on the "presentence report" of the U.S. Probation Officer. *United States v. Love*, 134 F.3d 595 (4th Cir. 1998); *in accord*, *United States v. Randall*, 171 F.3d 195, 205 (4th Cir. 1999).

A drug defendant may be convicted of selling a half gram of methamphetamine for fifty bucks, but her guideline sentencing range will be based on the district court's *finding* of her total drug relevant conduct (i.e., the total weight and type of drug(s) she has sold in her numerous drug sales that are proven by a preponderance of the evidence at the sentencing hearing, and are relevant). A gun defendant may be convicted of possessing only one stolen gun and her "base offense level" may therefore be 14 under Guideline 2K2.1(a), but this "base offense level" will be increased under 2K2.1(b) for the "specific offense characteristic" of having actually possessed (or, proven to have possessed by a preponderance of the evidence) 23 guns. And a white collar defendant's Guideline range will be determined based on all the money she embezzled, and not mere the amount of money in the count of conviction.

Unless you have a reason to argue relevant conduct at the sentencing hearing, try to reach an

agreement with the U.S. Attorney's Office as to total relevant conduct, such as the total weight of drugs, the total number of guns or the total loss to the victim.

c. The Presentence Report

Following a guilty plea or a conviction at trial, the district judge will order the probation officer to prepare a presentence report pursuant to 18 USC 3553(a) and Crim.P. 32(c). In preparing the report, the probation officer will receive discovery material in the case from the federal prosecutor. From the discovery material, the probation officer will calculate the sentencing guidelines for your client. A district judge can, and often does, base guideline findings solely on the presentence report (*United States v. Love*, 134 F.3d 595 (4th Cir. 1998)), so this is a critical document and you must work to impact it.

You will have two opportunities to impact the presentence report. Within a few days of the change of plea hearing, you will submit a written "version" of the offense to the probation officer who is preparing the presentence report. I do it in letterhead form, addressed to the probation officer. In this "version" you should explain your guideline positions. You will have an opportunity to object to the presentence report before the probation officer submits it to the district judge. If you do not file a timely written objection to the presentence report, then you can expect the district judge to adopt the presentence report and make consistent guideline findings.

d. The Sentencing Memo

Don't wait until the sentencing hearing to tell the district judge something important for the first time. The Local Rules permit the filing of a sentencing memorandum, wherein you should argue your objections to the presentence report, your position of the 3553(a) factors and state the sentence you believe should be imposed. Attach letters on behalf of your client from family members, neighbors and employers.

e. The Sentencing Hearing

The district court will first announce her tentative guideline findings and ask if there are any objections to either (1) the presentence report or (2) the tentative guideline findings. You will be given an opportunity to orally state and argue your objection, which you hopefully made in writing to the probation officer and in your sentencing memo.

Following the guideline findings, you and your client will be given an opportunity to speak. You can also call witnesses to speak on behalf of your client. Tailor these comments to the factors listed in 18 USC 3553(a) and ask for a sentence below the guideline range. Your client will be well dressed and prepared to say something about accepting responsibility. You know what they say: she who argues for herself has a fool for a lawyer.

f. The Sentence

1. No Parole: There is no parole in federal court and the defendant will never see a parole board.

2. Good Time: The Bureau of Prisons can, and likely will, award a "good time" sentence reduction of up to 54 days a year. *See* 18 USC 3624.

3. RDAP: A mere drug defendant (i.e., with no finding of violence or weapons) can also earn a one year sentence reduction for successful completion of the Bureau of Prison's excellent Residential Drug Abuse Program (RDAP). Granting the one year sentence reduction is in the discretion of the Bureau of Prisons, and all you can do is ask for a recommendation by the district judge that your client be given an opportunity to participate in RDAP. See 18 USC 3621(e)(2), titled "Incentive for prisoners' successful completion of treatment program –."

It can take months for an inmate to begin the "RDAP" program. The BOP won't consider the year reduction until after RDAP is successfully completed. You do the math. The defendant may actually serve less time in prison on a 33 month sentence (subtract a year for RDAP) than she would on a 24 month sentence. A district court cannot increase a sentence merely for rehabilitation, even though rehabilitation is a 3553(a) factor the District Court "shall" consider. *See United States v. Himes*, 493 Fed. Appx. 272 (4th Cir. (W.Va.) 2011); and *Tapia v. United States*, 131 S.Ct. 2382 (2011)(the Sentencing Reform Act precluded the district court from lengthening defendant's prison term to promote rehabilitation).

4. Half-way house: The Bureau of Prisons will likely place an inmate into a designated community half-way house during the last few months of her imprisonment term, where she will be merged back into society. *See* 18 USC 3624(c) "Prerelease custody –."

5. Supervised release: In addition to a number of months of incarceration, the District Judge will impose a fixed number of years of Supervised Release. When the defendant is released from prison, her supervised release begins. You can read about Supervised Release in 18 USC 3583. Determining the number of years of supervised release you can expect the District Judge to impose, you'll have to determine the "class" of the crime of conviction (at 18 USC 3559), if the statute of conviction does not specify the number of years of supervised release.

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III: Conclusion

The rule of *recency* gives the greatest impact to that which you hear last, and so I left to the end a bit from the West Virginia Rules of Professional Conduct:

> As a lawyer, you have a "special responsibility for the quality of justice." Your duties include "honest dealing with others," "respect for . . . those who serve in [the

legal system]" and behavior guided by "personal conscience."

IV: Appendix